No. 12026

In the United States
COURT OF APPEALS
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

IRENE ETHEL LAMBETH,

Appellee.

On Appeal from the United States District Court for the District of Oregon.

BRIEF FOR IRENE ETHEL LAMBETH, Appellee.

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JURISDICTION

This appeal involves cabaret admissions taxes and interest thereon claimed to have been imposed by Section 1700(e) of the Internal Revenue Code, as amended by Section 622 of the Revenue Act of 1942, for the period May 1, 1943 until July 31, 1944 in the total

amount of $6,917.91 (R. 9). The taxes in dispute were paid on September 18, 1944 (R. 8). A claim for refund was filed by the taxpayer on September 28, 1944 (R. 8). The claim was rejected by the Commissioner of Internal Revenue by notice dated February 11, 1946 (R. 8). On December 18, 1947, within the time provided by Section 3772 of the Internal Revenue Code, the taxpayer instituted an action in the District Court for the recovery of the taxes and interest paid (R. 2-4).

Jurisdiction was conferred on the District Court by Section 24, Twentieth, Judicial Code, Title 28, Section 41, Sub-division 20, U.S.C.A. Judgment was entered on April 27, 1948 (R. 17). Within sixty days thereafter and on June 26, 1948, notice of appeal was filed (R. 18-19). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1291.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 1700. TAX

There shall be levied, assessed, collected, and paid—

* * * * *

(e) (as amended by Section 622 of the Revenue Act of 1942, c. 619, 56 Stat. 798) Tax on Cabarets, Roof Gardens, Etc.—

(1) Rate.—A tax equivalent to.....per centum of all amounts paid for admissions, refreshment, service, or merchandise, at any roof garden, cab-

aret, or other similar place furnishing a public performance for profit, by or for any patron or guest who is entitled to be present during any portion of such performance. The term "roof garden, cabaret, or other similar place" shall include any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise. A performance shall be regarded as being furnished for profit for purposes of this section even though the charge made for admission, refreshment, service, or merchandise is not increased by reason of the furnishing of such performance. No tax shall be applicable under subsection (a) (1) on account of an amount paid with respect to which tax is imposed under this subsection.

(2) By whom paid.—The tax imposed under paragraph (1) shall be returned and paid by the person receiving such payments.

* * * * *

(26 U.S.C. 1946 ed., Sec. 1700)

STATEMENT OF FACTS

The statement of facts set forth in appellant's brief, hereinafter in this brief referred to as "the Government", is so misleading and the inference drawn from the testimony so distorted that appellee, hereinafter in this brief

referred to as "the taxpayer", deems it necessary to present a summary of the evidence as follows:

The Cozy Club was originally incorporated in August 1929 under the laws of the State of Oregon as a non-profit corporation (Plaintiff's Exhibit No. 1). On December 9, 1935 supplemental articles of incorporation were filed with the Corporation Commissioner of the State of Oregon changing the situs of the Cozy Club to Portland, Multnomah County, Oregon. On December 14, 1935 certificate of filing of supplemental articles of incorporation was issued by the Corporation Commissioner of the State of Oregon (Plaintiff's Exhibit No. 1). From on or about December 14, 1935 to on or about November 4, 1937 the Cozy Club maintained club rooms on Burnside Street in Portland, Oregon. On or about November 7, 1937 the Cozy Club leased the premises at 1017 S. W. 6th Avenue, which were maintained as the club rooms until May 18, 1943 (Plaintiff's Exhibit No. 1), when the club quarters were moved to 929 S. W. Yamhill Street, Portland, Oregon (Plaintiff's Exhibits No. 1 and 2).

For some time prior to October 13, 1941 Jack Church was the manager of the Cozy Club and at this same time the taxpayer, who was then unmarried and whose name was Irene Ethel Roskie, was engaged in the restaurant business at Eugene, Oregon (R. 38-39). At this same time one of the persons most interested in the Cozy Club was Dr. Paul Stevens who had known the taxpayer in the State of Montana, as had another member of the club, A. A. Lambeth. Since the Cozy Club needed a new

manager, Mr. Church having entered the Armed Forces, Dr. Stevens contacted the taxpayer and persuaded her to take over the management of the Cozy Club (R. 39). From the records of the Cozy Club it appears that Mr. Church was receiving a fixed salary as manager of the club and was also receiving compensation for the rental of certain equipment in the premises at 1017 S. W. 6th Avenue, Portland, Oregon (Plaintiff's Exhibit No. 1). The taxpayer purchased the equipment which Mr. Church was then leasing to the Cozy Club and the taxpayer and the Cozy Club then entered into an arrangement for compensation for the taxpayer's managing the club whereby the taxpayer was to pay all expenses of the operation of the club rooms and was to receive all of the profits arising from the sale of food and beverages on the club premises. The taxpayer had no interest in the initiation fees and dues, these being retained by the Cozy Club for its own benefit (R. 40, 41, 49).

Both the lease on the premises at 1017 S. W. 6th Avenue and at 929 S. W. Yamhill Street were executed by the Cozy Club as lessee (Plaintiff's Exhibits No. 1 and 2).

The records of the Cozy Club show that the premises at 1017 S. W. 6th Avenue were not satisfactory as the facilities for serving food were inadequate (Plaintiff's Exhibit No. 1). The new premises at 929 S. W. Yamhill Street, Portland, Oregon, were more commodious and were better adapted to club purposes. They contained complete restaurant facilities, barroom, check room, dining room, kitchen, lockers and dance floor, the total area

of which was approximately 2,500 square feet. There was seating capacity for around 150 people (R. 46, 49). Access to the club room situated on the second floor was by stairway at the bottom of which was a swinging double door and at the top of which was another door which was operated by an electrical device with a push botton on the inside (R. 47).

While the Cozy Club was located at 1017 S. W. 6th Avenue, the club maintained a separate account of all moneys paid by club members for dues and initiation fees (R. 49). It was necessary for the club before moving to 929 S. W. Yamhill Street, Portland, Oregon, to remodel and decorate the premises, the money for this remodeling and decorating being furnished by the club from initiation fees and dues from its members (R. 50). However, the Cozy Club did not have sufficient money to pay for all of the remodeling and decorating of the new club rooms so some money was personally loaned to the club by the taxpayer (R. 50). In the summer or fall of 1944 further remodeling was done to the premises at 929 S. W. Yamhill Street by the Cozy Club (R. 50). For the purpose of obtaining moneys to pay this remodeling dues of club members for the first six months of 1944 was fixed at $3.00 each (Plaintiff's Exhibit No. 1). On moving to the club rooms at 929 S. W. Yamhill Street all initiation fees and dues were deposited in a special account in the name of the taxpayer from which account the taxpayer reimbursed herself for advances made on behalf of the club (R. 50, 51). Separate books of account were kept for the Cozy Club showing receipts

from initiation fees and dues and disbursements, and seperate books of account were kept by the taxpayer (R. 51). All books of account of the Cozy Club were delivered to the Internal Revenue Department of the United States and are now in its possession and were not produced in the trial so that detailed statements of the receipts and disbursements of the Cozy Club are not available in this case (R. 51, 52).

At the time the taxpayer became manager of the Cozy Club on October 13, 1941 the only license that the club had from the Oregon Liquor Control Commission was a service license (see Chapter 464, Oregon Laws 1941) which permitted the licensee to mix and serve drinks prepared from liquor furnished by the patrons (R .45). It should be specifically noted that this license and all licenses mentioned hereafter were issued in the name of the Cozy Club (R. 125). On September 17, 1943 the Cozy Club received a restaurant license from the Oregon Liquor Control Commission which permitted it to serve food, beer and light wines (Oregon Liquor Control Act, Laws 1933, Second Session, Chapter 17). Under a restaurant license dancing was permitted (R. 48).

There is no contention made by taxpayer but that the licenses from the Oregon Liquor Control Commission, service and restaurant, were not the type of licenses to be used by a private club, but were the type of licenses issued to one serving the public as such (see Oregon Liquor Control Act, Laws 1933, Second Session, Chapter 17, Section 24-118). Because the Cozy Club

was a private club and operated as such, difficulties arose between the club and the Oregon Liquor Control Commission and on January 21, 1945 the club's restaurant license was revoked "for the reason that the club refused service to persons entitled to patronize the premises of the licensee and operated the licensed premises as a private rather than a public establishment" (R. 128).

Initiation fees for regular members were $3.00 and initiation fees for associate members, who must be members of the Armed Forces, was 50c and annual dues were fixed from time to time by the Board of Directors subject to a limitation of $10.00 per year as provided by the By-laws of the Cozy Club (Plaintiff's Exhibit No. 1). All applications for membership were passed upon by the Board of Directors, but during a considerable period of 1943 and 1944 the President, R. H. Lambeth, no relative of the taxpayer, was working in a war industry and was not able to attend all meetings so that generally the applications for membership were passed upon by the other officers, namely the taxpayer, and Margaret Sherman, the Vice President (R. 57). Selectivity was used in admitting applicants to membership and many applicants were rejected (R. 58).

There were no restrictions on the number of guests that a member might bring to the club room but in order to discourage members from bringing more than two guests, a cover charge of 75c was made on Friday and Saturday nights for each extra guest (R. 93, 94). On the basis of the cover charge collected from members for guests in excess of two on Friday and Saturday nights

an average of approximately 40 extra guests were present on each of those nights out of a total seating capacity of 150 (R. 46, 135).

The District Court found as a fact that during the period involved the taxpayer was managing the Cozy Club as a private club organized under the laws of the State of Oregon as a non-profit corporation; that the club was not open to the public but open only to members and their guests and that taxpayer was not operating a roof garden, carbaret or other similar place furnishing a public performance for profit; that the taxpayer filed a timely claim for refund of the taxes erroneously assessed against her and paid under protest (R. 14, 15, 16). Judgment was therefore entered for refund to the taxpayer of $6,917.91 with statutory interest (R. 17).

SUMMARY OF ARGUMENT

I.

The judgment is based upon findings of fact which have the force of the verdict of a jury. These findings are not reviewable except to determine whether supported by substantial evidence and not reversible unless clearly erroneous.

II.

In statutes relating to taxation words employed therein must be given their accepted and ordinary meaning, and all doubts must be resolved in favor of the taxpayer and where the taxing statute is clear and unam-

biguous no resort can be had to enlarge the scope thereof by interpretative regulations or unpublished ideas of the Treasury Department.

III.

The evidence clearly discloses that during the period involved the taxpayer did not furnish a public performance at a cabaret or other public place.

ARGUMENT

I.

District Court's Findings of Fact Are Conclusive

A fair consideration of the record herein can leave no doubt whatever that the findings of fact are not only supported by substantial evidence but are supported by the clear preponderance of the evidence, and in fact the Government has produced no evidence whatsoever which would permit contrary findings.

Rule 52 (a) of the Federal Rules of Civil Procedure in part provides:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . ."

In *Wittmayer v. United States,* 118 F. (2d) 808, 811 (9th Cir.), this court said:

> "The findings of the trial Court fall within the familiar rule, that where based upon conflicting evidence they are presumptively correct, and unless

some obvious error of law, or mistake of fact, has intervened, they will be permitted to stand.

"The provisions of the new procedural rules that the findings of fact of the trial judge are to be accepted on appeal unless clearly wrong . . . is but the formulation of a rule long recognized and applied by courts of equity. Guilford Const. Co. v. Biggs, 4 Cir., 102 F. (2d) 46, 47.

"As was said by Mr. Justice Holmes in Adamson v. Gilliland, 242 U.S. 350, 353, 37 S. Ct. 169, 170, 61 L. Ed. 356 (citing Davis v. Schwartz, 155 U.S. 631, 636, 15 S. Ct. 237, 39 L. Ed. 289), the case is pre-eminently one for the application of the practical rule, that so far as the findings of the trial judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' "

II.

Rules of Construction of Statutes Relating to Taxation

It is axiomatic that the intention of the Legislature with respect to tax statutes must be ascertained from the language of the act itself and that no tax can be imposed without clear and express language for that purpose.

"Unless the context shows that they are differently used, the words employed are to be given their ordinary meaning, and the effect of the statute is not to be extended by implication or forced construction beyond the clear meaning or import of the language used . . . " 51 Am. Jur. 362.

"Language used in tax statutes should be read in the ordinary and natural sense." *Helvering v. San Joa-*

quin Fruit & Investment Co., 297 U. S. 496, 499, 56 S. Ct. 569, 570.

"The literal meaning of the words employed in tax statutes is most important, and the general rule requiring adherence to the letter in construing statutes applies with peculiar strictness to tax laws." 51 Am. Jur. 362.

In the case of *U. S. v. Merriam,* 263 U. S. 179, 187, 44 S. Ct. 69, 71, we read:

"On behalf of the government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer. Gould v. Gould, 245 U. S. 151, 153, 38 S. Ct. 53, 62 L. Ed. 211. The rule is stated by Lord Cairns in Partington v. Attorney General, L. R. 4. H. L. 100, 122:

'I am not at all sure that in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.' "

"Any doubts as to their meaning are to be resolved against the taxing authority and in favor of the taxpayer . . . " 51 Am. Jur. 367.

"It is a familiar canon in the interpretation of tax laws that they are to be construed strictly. If the right to the tax is not conferred by the plain words of the statute it is not to be extended by implication. If it is not within the letter it is vain to invoke the spirit of the tax law." *Hill v. Treasurer,* 229 Mass. 474, 118 N. E. 891.

In *Hecht v. Malley,* 265 U. S. 144, 156, 44 S. Ct. 462, 466, the court stated:

"Nor does the language of the act in this respect call for the application of the established rule that in the interpretation of statutes levying taxes their provisions are not to be extended by implication beyond the clear import of the language used, and in case of doubt are to be construed most strongly against the Government and in favor of the taxpayer."

As in *Hecht v. Malley,* supra, the taxing statute is so clear that there is no necessity for resorting to rules of interpretation, and the word "public" as used in the statute, "public performance" and "public place", must be given its ordinary meaning. We doubt if there is any one word in the English language that has a more generally accepted meaning than the word "public", and the phrase "public place" is universally understood as meaning a place where all persons have a right to go and be. This is the definition adopted by all standard dictionaries.

"The phrase 'a public place' has received a construction by this court and has been construed to mean a

> place where the public has a right to go and be, and does not include all places where people may be congregated together." *State v. Welch,* 88 Ind. 308.

In interpreting earlier cabaret tax statutes Judge Underwood in *Deshler Hotel Co. v. Busey,* 36 F. Supp. 392, 394, affirmed by the Circuit Court of Appeals, 6th Circuit, 130 F. (2d) 187, stated:

> "In the main, the terms of the statute are clear and unambiguous. It is readily apparent that it contains four essential requirements and that all of these must be present before the tax can be required . . .
> The second requirement of the statute is that the performance in question must have been a public performance . Here again the law is clear and not subject to administrative interpretation. The expression 'public performance' has an ordinary and accepted meaning, readily understandable. The context does not indicate that any other meaning is intended and the term is not defined by the regulation. We may therefore accept the intent of Congress as being that the ordinary meaning of the phrase shall be used."

In *Schuster's Wholesale Produce Co. v. United States,* 49 F. Supp. 909, 911, District Judge Dawkins in construing the 1941 cabaret tax statute stated:

> "Judge Underwood in the absence of a definition by the statute itself of the term 'public performance' applied the ordinary dictionary meaning and found that under the facts of that case there was such a performance."

Nor can the Government sustain the levying of the tax in this case by enlarging the scope thereof by interpretative regulations or unpublished ideas of the Trea-

sury Department as to Congressional intent.

> "Where the language of a taxing statute is plain and unambiguous there is no occasion for resort to interpretative promulgations of the Treasury Department. Neither the administrative officers nor the courts may supply omissions or enlarge the scope of the statute."
> Busey v. Deshler Hotel Co. (C.C.A. 6th Cir.), (supra).

See also *Iselin v. U. S.*, 270 U. S. 245, 250, 46 S. Ct. 248, 250, where Judge Brandeis stated:

> "The statute was evidently drawn with care. Its language is plain and unambiguous. What the government asks is not a construction of a statute but in effect an enlargement of it by the court, so that what was omitted, presumably by inadvertance, may be included within its scope. To supply omissions transcends the judicial function."

On page 20 of its brief the Government states that to carry out the intent of Congress the Bureau of Internal Revenue has been endeavoring to tax organizations where five elements are present, to-wit:

> "(1) food and refreshments are served for profit, (2) entertainment, such as dancing privileges, is provided, (3) the predominant purpose of the organization is the advancement of the commercial interest of the owner, manager or principal stockholder, (4) members have no equity in the profits or assets of the organization, and (5) local liquor laws are such that it is more advantageous for the organization to operate under the guise of a private club than openly as a cabaret."

Obviously the unpublished ideas of the Internal Revenue Department as to the intent of Congress have

absolutely no bearing on the question before this court. It is interesting to note, however, that even under the tests laid down by the Internal Revenue Department the taxpayer would not be subject to the tax in this case since the Liquor Laws of the State of Oregon are such that it is no more advantageous for an organization to operate as a private club than openly as a cabaret. In fact it is clear from the evidence that the Liquor Laws of the State of Oregon are such that it is more advantageous and easier to operate as a cabaret than as a private club.

It is clear that if Congress had intended to tax any place where dancing was permitted and where a profit accrued to some person as a result thereof, such as in the instant case, Congress would have clearly indicated such intention by eliminating the word "public" which occurs twice in the Act. This would not in any manner affect private clubs, since these clubs are not operated for profit.

III.

During the Period Involved the Evidence Clearly Discloses That the Taxpayer Did Not Furnish a Public Performance for Profit at a Cabaret or Other Public Place

The Government contends that the imposition of the cabaret tax by the Government was proper on the theory that a public performance for profit occurred at 929 S.

W. Yamhill, Portland, Oregon, and that this establishment was a cabaret or other public place where music and dancing privileges were afforded the patrons thereof in connection with the serving or selling of food or refreshments. The gist of this argument is epitomized on page 15 of the brief as follows:

> "For all intents and purposes, she (the taxpayer) was the owner of the establishment operating under the guise of a private club, but which, we submit, was in reality a cabaret or other similar place open to the public."

To put it plainly the Government is contending that the taxpayer was operating a public cabaret and that the Cozy Club was simply a shield, as it were, to give color to the contention that patrons of the cabaret were not subject to the cabaret tax.

The pertinent portions of Sec. 1700 (e) of the Internal Revenue Code, as amended, are as follows:

> "A tax . . . for admission, refreshment, service, or merchandise at any roof garden, cabaret or other similar place furnishing a public performance for profit . . . The term roof garden, cabaret or other similar place shall include any room in any hotel, restaurant, hall or other public place where music and dancing privileges . . . are afforded the patrons in connection with the serving or selling of food, refreshments or merchandise. . . "

It is clear that the test of whether the tax is or is not applicable is whether or not there was a public performance in a public place. The question, then, of whether the Cozy Club was or was not a bona fide private club is not controlling, the only issue being was or

was not the establishment at 929 S. W. Yamhill, Portland, Oregon, open to the public. It is therefore only necessary for the taxpayer to sustain the proposition that the establishment at 929 S. W. Yamhill was not open to the public in order to recover the tax assessed. Obviously if the Cozy Club was a private club, as the term is commonly understood, the club would not be open to the public and there is no theory on which the tax could be assessed.

That the Cozy Club was an existing private club is amply sustained by the evidence and in fact there is absolutely no evidence which would justify the Government in making the bland statement that the taxpayer was operating a cabaret open to the public under the guise of a private club.

In any private social club there must be club facilities and if the club is to succeed it must provide itself with good personnel to operate the club. The club facilities were provided by the Cozy Club itself and not by the taxpayer, (Plaintiff's Exhibit No. 2). It is true that the evidence shows the taxpayer purchased certain equipment from Mr. Church when the club was located on the premises at 1017 S. W. 6th, (R. 39) but it is equally clear that when the club rooms were moved to 929 S. W. Yamhill the Cozy Club was the lessee of the premises and assumed the burden and obligation of remodeling the premises and making them suitable for the use of the club, (Plaintiff's Exhibit No. 2, R. 50). The record is clear that the Cozy Club had been established as a non-profit corporation in Oregon since 1935, (Plaintiff's

Exhibit No. 1). It is also clear that the taxpayer did not seek the position of manager but was sought out by Dr. Paul Stevens, an active and interested club member. (R. 39). There is nothing strange about the business relationship between the taxpayer and the Cozy Club. It was probably, as the minutes of the Cozy Club indicate (Plaintiff's Exhibit No. 1), a most satisfactory arrangement since it insured the members of the club of well-operated club rooms without the necessity of having a complicated bookkeeping system and without the fear of operating at a loss. Obviously if the taxpayer rendered unsatisfactory service or charged exorbitant rates for food, the mixing of beverages, etc., her employment would be terminated.

The Cozy Club as a club was financed by initiation fees and dues of its members in which the taxpayer had absolutely no interest (R. 40, 41, 49). This was the situation when the club was located at 1017 S. W. 6th and likewise the situation when the club was located at 929 S. W. Yamhill, and there is absolutely no basis for the statement in the Government's brief that at the time the taxpayer took over the management the taxpayer became entitled to all receipts from operations whether from membership fees, dues, etc.

The Cozy Club as such maintained books of account in which all receipts derived by the club from dues and initiation fees and all moneys disbursed were accurately recorded (R. 49). These books of account of the Cozy Club have been in the possession of the Government at least since the spring of 1947 (R. 51, 52), and should

have been produced by the Government at the trial of this case if the Government was going to take the position it does now that the Cozy Club had in fact no existence. While the books have been withheld by the Governement the amount of money handled by the Cozy Club was substantial, and, as the taxpayer said, can be arrived at even without the books, since we have a complete roster of the members each year (Plaintiff's Exhibit Nos. 3 and 4), know the initiation fee, and know the amount of the annual dues, (Plaintiff's Exhibit No. 1). All of this money derived from initiation fees and dues was expended by the Cozy Club for remodeling and redecorating and improving the club facilities (R. 40). The taxpayer was not obligated to expend any money for remodeling, decorating and providing facilities (R. 50). It is true that the taxpayer did make advances to the Cozy Club for this purpose with the expectation that she would be repaid out of dues and initiation fees (R. 50).

Let us consider the question from a negative point of view. At all times since the assessment was levied against the taxpayer the Government has had access to and during a large portion of the time has had actual possession of the records of the Cozy Club itself. These records disclose the names and addresses of all employees of the taxpayer, the names and addresses of all members of the club, of which practically all the civilian members were residents of Portland, Oregon. If the Cozy Club were, to use a colloquial but expressive term, a "phoney", you may be sure that the Government would have had numerous witnesses, who according to the records were club members or employees, testifying on behalf of the

Government, yet not one single person, either a purported member of the club or an employee, was produced as a witness by the Government. The Government has also failed to explain or to offer any plausible reason why the Cozy Club on May 1, 1943, suddenly ceased to be a private club and became a public cabaret.

The Government criticizes the method that was used in admitting members to the club, particularly the method used in admitting associate members who were required to be members of the Armed Forces. The Government states that membership in the club at a cost of $3.00 a year was easy to obtain and it also criticizes the amount of the annual dues and the initiation fee for associate members. Perhaps the requirements for admittance to membership were not as exacting as in some of the more exclusive clubs in Portland, but there were certain requirements as to qualification for membership. Affirmative action had to be taken before a person could be admitted to membership, and there was an element of selectivity (R. 56—59, 78, 104, 105, 118, 121). The difference between the requirements for admittance to a so-called exclusive social club and the requirements for admittance to the Cozy Club is solely a matter of degree. We venture to suggest that it was no more difficult to obtain membership in the so-called "popular" social clubs such as the Elks or Eagles than it was to the Cozy Club, and yet the Government would never contend that the bar services customarily maintained by the Elks or the social dances conducted by the Eagles are subject to cabaret taxes, even though members are privileged to and customarily do invite numerous guests.

We further venture to suggest that if the initiation fees had been $25.00 instead of $3.00 the Government would not maintain that the Cozy Club was not a private club. In short, in the government view, if a group of people associate themselves together for the purpose of forming a club and make the initiation fees and dues so large that only a few people have the means to join such a club, they are exempt from taxation; whereas if people who do not have the means to join a high-cost so-called exclusive club associate together under modest initiation fees and dues and provide an establishment where they can have social gatherings, can dance, can have liquid refreshments mixed at a bar, and can take their friends and associates, and their girl friends, if you please, and where only these members and their invited guests can obtain admittance, than these particular people cannot be considered as forming a private social institution but must be considered as operating a public cabaret and therefore taxable.

We frankly concede that if anyone could gain admittance to the club by simply paying a stated fee that this fee should be considered as an admision fee and that the premises would be a public place. The payment of money to get into any particular building is admittedly no proof of the private character of the place for which admittance is paid. In order to constitute a private, as contrasted with a public place of entertainment there must be some definite restrictions on the right of the public as such to enter. There must be some element of selectivity and this selectivity is found in the opera-

tions of the Cozy Club. It is true that a less exacting standard was adopted as to members of the Armed Forces, but there was selectivity.

The record shows that officers were admitted to membership in the Aero Club as associate members (R. 104). So is the Cozy Club any different because it admitted as associate members, members of of the Armed Forces holding rank less than ensign or second lieutenant? Actually there was selectivity even in the admittance as associate members of persons who were in the Armed Forces of the United States, and it is a gross misstatement and not supported in any particulars for the Government to state that the Cozy Club exercised no more discretion in admitting guests and passing on members than was exercised by the average doorman of a public cabaret.

As heretofore stated, the sole issue in this case is not whether the Cozy Club was or was not a private club, but whether the premises at 929 S. W. Yamhill were open to the public. We submit that the evidence is uncontradicted that the premises at 929 S. W. Yamhill were not a "public place".

Edith L. Deck, a member of the Cozy Club, testified as follows (p. 77-78 of Trans. of Record):

> "Q. Will you tell the Court, please, as to whether or not in its operations and particularly during the period from April 1st or May 1st, 1943, which was approximately half a month before you moved to 929 Southwest Yamhill, from that date up until September 1, 1944, do you know who could get into the clubrooms?

A. Only those who were members or those who made application to become—that is, those who applied for membership.

Q. Who were guests?

A. Guests could come in if they were brought in by a member.

Q. Particularly directing your attention to 929 Southwest Yamhill, could anyone get into the clubrooms or be permitted in there who was not a member or guest of a member.

A. I would say no.

Q. Your answer is no?

A. Yes.

Q. Have you ever had any occasion to see people try to get into the clubrooms that were turned away?

A. Very often.

Q. Was that a fairly common occurrence?

A. I would say it was during the wartime."

C. B. Marx, a member of the Cozy Club, testified as follows (p. 100-101 of Trans. of Record):

"Q. Were you a member during 1943 and 1944 when Mrs. Lambeth was acting as manager?

A. I must have been because I always have been a member ever since it was—

Q. Mr. Marx, during the time of the operation of the club on Southwest Yamhill, was it open to anybody or was it open only to members?

A. Only to members.

Q. Do you know that of your own personal knowledge.

A. Yes.

Q. Have you ever seen an occasion, Mr. Marx, when people were refused admittance who were not club members?

A. Yes, I have.

Q. Have you ever seen an occasion when people who were not club members got in, where they

were not guests of some club member?
A. No."

R. H. Lambeth, President of the Cozy Club, no relative of taxpayer, testified as follows (p. 106 of Trans. of Record):

"Q. Do you know whether or not the question of judging applications was done in a fair manner, so that those people that you thought were entitled to join got in and those who were not, did not?
A. Well, from the conduct of the club, I believe it was done in a fair manner.
Q. Was it such a thing that anybody that made application got in, or was there selectivity of the people that got in?
A. There was selectivity of the people."

Lanice Shanahan, an employee of taxpayer, testified as follows (p. 110-111 of Trans. of Record):

"Q. During the period of time you were there, will you state whether or not the LaFiesta or Cozy Club was operated as a private or a public club?
A. Private.
Q. How do you know that?
A. People that were not members were not allowed in; had to be a member to be allowed in."

Margaret Sherman, Vice President of the Cozy Club, testified as follows (p. 117 and 118 of Trans. of Record):

"Q. Were you an officer at any time when they were up on Yamhill Street?
A. That is when I became an officer.
Q. What can you say as to the practice or the method of operation of the club, specifically from May 1st, 1943, to September 1st, 1944,as to whether or not it was open to the public, or whether it was operated as a private club and open solely to mem-

bers and members when accompanied by guests—guests when accompanied by members, rather.

A. We were strictly a membership club, open only to members and their guests."

* * * * *

"Q. Just tell the Court what the machinery was?

A. Members would come in and we would take their application for others who wished to be a member, and then we would decide, and if they were eligible to become members we took them in.

Q. Did everybody who made an application become a member?

A. No, sir.

Q. Did you use a degree of selectivity in ascertaining who should or should not be members?

A. We did.

Q. Other than law enforcement agents, up to 1945, do you know whether or not any person came —Do you know of any person coming to the club who was a non-member and who did not come as a guest?

A. I certainly do not."

If there is any question but that the Cozy Club was not open to the public it is put to rest by the testimony of Frederick C. Aldrich, the only witness produced by the Government who testified as to substantial facts relative to the operations of the Cozy Club. Because this was a witness produced by the Government itself and a disinterested party, we believe the testimony of this witness is determinative of the case.

Mr. Aldrich testified in part as follows (p. 125-128 of Trans. of Record):

"Q. As I understand it, it is your testimony here that the Cozy Club had a service license and a restaurant license at 929 Southwest Yamhill Street, is that correct?

A. That is right.

Q. And the applicant that had that license was the Cozy Club and Irene E. Lambeth, Manager, was it not? Or was it just the Cozy Club, Irene E. Lambeth, Manager?

A. By Irene Lambeth, Manager.

Q. In other words, the license was in the name of the Cozy Club and it just recited on there 'Irene E. Lambeth, Manager', isn't that correct?

A. That is right.

Q. I think your records will also show, will they not, that from the 20th of January, 1945, until the 14th of February, 1945, this club was without any license?

A. May I have those dates again?

Q. I think it was on or about the 20th or 21st day of January, 1945, to on or about the 14th day of February, 1945?

A. That is right.

Q. Do I have my dates exactly right?

A. The license was canceled January 21, 1945, and reinstated February 14, 1945.

Q. February 14, 1945?

A. Yes.

Q. Now, sir, is it not a fact that the reason why that license was canceled was because the Commission claimed that it, the Cozy Club, was being operated as a private club?

A. That is right.

Q. In other words, the only license that they had, the Cozy Club, to operate was a service license and a restaurant license?

A. That is right.

Q. That type of license compelled them to accept anybody from the public that conducted themselves in a reasonable decorous manner?

A. That is right.

Q. And since the Cozy Club was only operated as a private club, they revoked the license because they were doing what the Liquor Com-

mission thought they were not entitled to do, to-wit, operate a private club, is that correct?

A. That is right.

Redirect examination by Mr. Hamilton:

Q. I would like to ask you, Mr. Aldrich: The reason that the club was closed up and the reason they said they were operating as a private club was because, in December, 1945, an inspector, I believe of the Liquor Commission, went to the club and was refused admittance, isn't that correct?

A. That is right.

The Court: Who?

Mr. Hamilton: A liquor investigator, your Honor.

Q. And when you say that the license was revoked in January because it was operated as a private club, what you actually mean is that—Did you mean that it was attempted to be operated as a private club? Did you mean that it was attempted to be operated as a private club when it was not licensed to do so?

Mr. Vosburg: Just a minute, Your Honor.

The Court: Read the question.

(Question read)

The Court: Answer.

A. I have no way of telling how the club was operating except from our investigator's report and the reason the Commission gave for revoking the license. The license was revoked for the reason that the club refused service to persons entitled to patronize the premises of the licensee and operated the licensed premises as a private rather than a public establishment.

The Court: What have you just read from?

A. Read from the official record in the file of the Cozy Club.

The Court: The record of the Oregon Liquor Control Commission?

A. Yes.
Mr. Vosburg: That is dated when?
A. That is dated January 19, 1945."

CONCLUSION

The Government has conceded in its brief that cabaret taxes in the amount of $379.70 plus statutory interest were illegally collected for the period from May 1, 1943 to September 17, 1943. It is respectfully submitted that the cabaret taxes and interest in the amount of $6,538.21 for the period from September 17, 1943 through July 31, 1944 were likewise illegally assessed and collected from the taxpayer, and that the judgment of the District Court should in all respects be affirmed.

Respectfully submitted,

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